Supreme Court, U.S.
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No. 93-1515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

October Term 1993

No. 93-1515

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

PETITIONERS,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners respectfully request this Court to grant their Petition For A Writ of Certiorari To The Supreme Court of Virginia to review the Court's holding that petitioners' causes of action for

common law trespass and nuisance are time barred under provisions of Virginia Code §§ 8.01-230 and 8.01-243(b). The suit filed on March 19, 1991, arose from the then presence of 5.5 inches of free floating gasoline found on petitioners' property and the then presence of additional underground gasoline contamination located uphill which had not yet entered petitioners' property.

The issues raised are of great constitutional significance, important to all property owners whose land is contaminated by underground gasoline originating from defective underground storage tanks owned and operated by big oil companies such as Exxon Corporation.

The issues raised by petitioners are typical of those affecting adjoining property owners at literally thousands of retail gasoline station sites. The harsh

ruling by the Virginia Supreme Court, reached without written findings concerning obvious factual disputes or reasoned analysis of difficult legal issues, affects the future rights of countless numbers of Virginia citizens.

The summary denial of both substantive and procedural due process to petitioners undermines public confidence in the fairness and integrity of the judicial system.

I. THE CONSTITUTIONAL ISSUES WERE TIMELY RAISED AND DECIDED BY THE TRIAL COURT

The Brief In Opposition of Exxon Company, U.S.A., argues that the Petition should be denied because federal constitutional issues were not properly raised before the trial court. Contrary to Exxon's assertions, the record is clear that in the trial court petitioners repeatedly asserted the unconstitutionality of the Virginia statute should it be interpreted as to time bar petitioners' claims. The issue was raised often during extensive pretrial proceedings before Judge Sheridan, who ruled that factual issues existed which could be resolved only by the jury on the issues of negligence, trespass, and estoppel, and by the trial court on the

nuisance issue.[1] Further, the record is crystal clear that the constitutional issues in question were indeed submitted and ruled upon by Judge Kendrick at the time of his entry of the final Order of Dismissal.

The applicability of Virginia Code §§ 8.01-230 and 8.01-243(b) to the issues of trespass and nuisance was argued at length before Judge Sheridan on December 10, 1992, in connection with Exxon's Demurrer seeking dismissal of plaintiffs' common law claims.

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[1] The repeated statement by Exxon (Brief in Opposition at 2, 3 n.1, & 11) that petitioners never alleged, and that no evidence existed of, any breach of duty subsequent to November 1977 is obviously incorrect. See excerpts from petitioners' Motion For Judgment alleging continuous violations at Supplemental Appendix SA-1, 2; statements made by Exxon's counsel at SA-3; and proffer of evidence to Judge Sheridan at SA-3, 4, 12, 13, 14, 15, 16, 17.

On December 10, 1992, Judge Sheridan ruled on the trespass count: "The demurrer is overruled." Transcript at 12.

On the nuisance count, Judge Sheridan ruled:

> I think there's separate causes of action allowed to be pleaded in the alternative. At present, it is my intent to not have the jury decide nuisance; to let the judge decide nuisance and the jury decide other issues.
>
> But the demurrer to the nuisance count is overruled.

Id. at 17.

On January 13, 1993, Judge Sheridan again considered Exxon's arguments that plaintiffs' causes of action were time barred under Virginia law. The constitutionality of the statute was clearly addressed before Judge Sheridan, and plaintiffs' counsel specifically called to the Court's attention the concurring opinion of Justice Stephenson

in Keller v. Denny, 352 S.E.2d 327, 332 (Va. 1987). SA-6, 7.

At the hearing before Judge Sheridan on January 13, 1993, plaintiffs' counsel stated:

> MR. McDONALD: Good morning, Your Honor. We think it's crystal clear the plea in bar has to be denied for three separate reasons, not the least of which is the Virginia Supreme Court in their cases cited by the defendant has clearly rejected their interpretation of the accrual statute.
>
> And as indicated, if the accrual statute were to be interpreted so as to bar a cause of action before the injury had actually occurred, that it raises a serious constitutional question. But that is not an issue we think the Court has to reach.

Id. at 11.

Judge Sheridan ruled as follows:

> THE COURT: This is a difficult call. I'm denying the plea in bar without prejudice to any further fact finding on it, and putting the parties on

> notice that I may issue a written opinion on this.
>
> The written opinion may or may not overrule the plea in bar. It is a fascinating and to me a contradictory status as to what the statute is now in Virginia, and trial judges can read the various Supreme Court decisions and/or disagreements within the Supreme Court and recognize the law in Virginia may indeed be described as harsh, that the statute of limitations can run before you realize or can suffer your damage.
>
> I think Virginia law states exactly that, that it can happen. But the saying of, the reading of, the comprehension of it keeps me in somewhat of a pause. So I'll look at it further, but for the moment, I deny it.

Id. at 23.

The applicability of Va. Code § 8.01-230 and 8.01-243(b) was argued again before Judge Sheridan on February 4, 1993.

Counsel for plaintiffs argued to Judge Sheridan again at that time that a dismissal of plaintiffs' claims as time

barred would violate due process clauses of the state and federal Constitutions.

> MR. MCDONALD: Well, the Supreme Court of Virginia, there has never been a case that the Virginia Supreme Court has adopted this interpretation in a negligence case, and the Supreme Court has clearly indicated it would pose a serious constitutional question.

Id. at 19-20. Judge Sheridan then denied Exxon's Plea in Bar: "I'm going to leave my ruling on the statute of limitations where it's been." Id. at 24.

On March 9, 1992, just before a jury panel was to be selected, Judge Kendrick assumed the bench and asked for a proffer of evidence on the issue of equitable tolling of Virginia Code §§ 8.01-230 and

8.01-243(b).[2] Then, without making any finding of fact on the numerous factual issues, or making any analysis of the previous rulings of Judge Sheridan relating to plaintiffs' trespass and nuisance claims, Judge Kendrick orally dismissed plaintiffs' claims on the grounds they were all time barred. In a matter of minutes, Judge Kendrick orally reversed the months of painstaking pretrial proceedings.

Because plaintiffs' counsel had acted in reliance upon the earlier rulings by

---

[2] Plaintiffs proffered a prima facia case that Exxon was equitably barred from asserting a limitations defense because of Exxon's fraudulent concealment of the known contamination moving eastward towards plaintiffs' property. Burnette v. New York Central R.R. Co., 380 U.S. 424, 427 n.2 (1965); Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 232 (1959). Judge Kendrick made no factual findings. The Virginia Supreme Court declined without explanation to review the issue. See SA-12, 13, 14, 15, 16, 17.

Judge Sheridan that unresolved factual issues were to be tried to the jury and the court, and because counsel had no prior notice of Judge Kendrick's intention to dismiss the entire case on the morning of trial for statute of limitations reasons, plaintiffs timely filed a written Motion For Reconsideration, which was heard by Judge Kendrick on April 30, 1993. The written brief accompanying the motion contained a separate section on constitutional issues that specifically cited the Fourteenth Amendment of the United States Constitution and its due process clause.

Also during the hearing on April 30, 1993, plaintiffs' counsel submitted to Judge Kendrick a proposed Order setting forth in writing the de facto ruling of the Court that the United States Constitution was not violated.

The proposed Order submitted to the trial judge during the hearing, stated in part:

> ORDERED that the application of Virginia Code § 8.01-230 and § 8.01-243 to bar plaintiffs' claims prior to the time of injury does not violate the due process and equal protection clauses of the Virginia Constitution and the Constitution of the United States;

Judge Kendrick declined to sign plaintiffs' proposed Order, signing instead the Order submitted by Exxon's counsel. The transcript of April 30, 1993 leaves no doubt that Judge Kendrick clearly considered and ruled upon the significant constitutional issues now before this Court. See Petition For Certiorari at 13-14.

II. VA. CODE §§ 8.01-230 AND 8.01-243(B) ARE UNCONSTITUTIONAL AS APPLIED

A.

Respondent's assertion that the petitioners have no rights under Virginia law is erroneous. Under the Virginia common law imported from England prior to our nation's birth, petitioners have property rights in fee which include the right to protect their property from pollution. Under the law as it has existed for hundreds of years, neither trespass nor nuisance remedies are available prior to the property actually being invaded.

In the instant case, the Court held that the statute of limitations ran even before any invasion took place. Since petitioners' trespass and nuisance causes of action were, according to the Court, totally repealed, petitioners are unable

to vindicate their rights. Petitioners clearly have been denied due process and are entitled to be before this Court. In barring petitioners' claims, Virginia law takes from petitioners and transfers to respondent a de facto easement to pollute petitioners' property.[3] Petitioners' vested property rights have been taken from them by the Commonwealth of Virginia without just compensation and transferred to Exxon.

B.

In arguing that the petitioners lacked any existing property right in its causes of action, respondent cites to dicta in Silver v. Silver, 280 U.S. 117, 122 (1929) which states that "the Constitution does not forbid the creation

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[3] Exxon's claims that the gasoline came from another source is inconsistent with evidence developed in discovery. SA-12, 13, 14, 15, 16, 17.

of new rights, or the abolition of old ones recognized by the common law." This argument is misplaced

This Court has never decided whether a state has the power to do away with the trespass and nuisance causes of action without violating the Fourteenth Amendment's Due Process Clause. Even if a state has such power, petitioners contend that this Court would not uphold the repeal of a trespass or nuisance cause of action without at least a statement from the legislature to justify such an action, or without any finding of a rational basis for such action. To repeal these ancient causes of action that are effectively the cornerstones of property rights embodied in our common law under the guise of a mere revision of procedure not intended to change substantive law, would be a classic case of failing to make law rationally

relate to a legitimate legislative objective. Zobel v. Williams, 457 U.S. 55 (1982).

Respondent tries to justify the statute in question by calling it a statute of repose. But, a substantial body of Virginia law defines a statute of repose as entirely different from the statute of limitations in question here. Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 819 (Va. 1990); Commonwealth v. Owens-Corning Fiberglas Corp., 385 S.E.2d 865, 867 (Va. 1989).

While the Virginia Supreme Court has upheld a state statute of repose, Virginia Code § 8.01-250, it did so in the context of distinguishing this quite different statute of limitations, which bars a legal remedy, but is not designed to extinguish all future causes of actions from a date unrelated to the injury. Hess, 392 S.E.2d

at 819. The statute in issue here is not a statute of repose. See, Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1223 (10th Cir. 1991) (distinguishing statutes of limitations from statutes of repose).

C.

Respondent claims that for state action to exist, Virginia would have had to coerce or encourage Exxon to release gasoline from its underground gasoline tanks. But the gravamen of this case has nothing to do with accusing Virginia of involvement in the initial release of gasoline. Petitioners complain that Virginia bars petitioners from ever enforcing their property rights to keep respondent's gasoline off their property, or forcing respondent to remove the contamination Exxon caused.

D.

In arguing that no violation exists of the Equal Protection Clause of the Fourteenth Amendment, respondent urges that under Virginia Code § 8.01-230, the class of persons treated exactly alike includes anyone with a potential cause of action for injury to person or property. That is not correct. The law has not changed for injuries to person. In those cases, the cause of action does not begin to run until injury has been caused. But, the law has distinctly changed for property owners whose time for asserting causes of action in trespass and nuisance for injury to property expires before any damages occurs. Such persons, like petitioners, whose rights are cut off from filing suit, are those whose property is invaded and damaged by gasoline many years after an uphill spill from underground

gasoline storage tanks owned and operated by other parties.

CONCLUSION

For the reasons stated above and in the Petition For A Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,

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Counsel for Petitioners
* Counsel of Record

SUPPLEMENTAL APPENDIX

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs, vs. EXXON CORPORATION, et al., Defendants.	At Law No. 91-329

MOTION FOR JUDGMENT

14. In a written report delivered to plaintiffs in mid-August 1990, Versar reported that testing in two test well sites located at the edge of North Washington Boulevard in front of 3435 disclosed the existence of gasoline and acetone in the groundwater. The two test wells are located across the street and downgrade from 3444 North Washington Boulevard, which has been operated as a gasoline station since approximately 1969.

* * *

COUNT II

(Trespass)

49. Defendants have caused and continue to cause petroleum, hazardous, and contaminated products to remain and migrate through the soil and groundwater onto and underneath plaintiffs' property at 3435 North Washington Boulevard.

* * *

COUNT III

(Nuisance)

53. Defendants' acts and omissions resulting in the discharge and migration of petroleum, hazardous, and contaminated products into the soil and groundwater beneath plaintiffs' property at 3435 North Washington Boulevard unreasonably interfered with, and continues to interfere with, plaintiffs' right to enjoy, hold, and alienate such property.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs, vs. EXXON CORPORATION, et al., Defendants.	At Law No. 91-329

Arlington, Virginia
Thursday, December 10, 1992

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

MS. SNEE: . . . The defendant Exxon demurs because we want to know when the alleged trespass was by Exxon and is that continuous trespass by Exxon.

Tr. at 7.

MR. MCDONALD: . . . They took our expert's testimony yesterday. Our expert tells us from Versar that there is a plume

of pollution above the Wittstatt property which is borne out in the free-floating gas which is what we're talking about. It's not static. It moves some.

* * *

We allege gasoline we found in July of 1990 based on the limited ground water flow we had probably came on the property a couple of months before, and it is subject to rainfall, seasonal fluctuations in temperature.

But our expert will testify that the existing ground water each day, some of it moves on the property, some of it moves off the property and onto the Warner property.

Tr. at 9.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al.,	:	
Plaintiffs,	:	
vs.	:	At Law No. 91-329
EXXON CORPORATION, et al.,	:	
Defendants.	:	

Arlington, Virginia
Wednesday, January 13, 1993

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

MR. McDONALD: Good morning, Your Honor. We think it's crystal clear the plea in bar has to be denied for three separate reasons, not the least of which is the Virginia Supreme Court in the cases cited by the defendant has clearly rejected their interpretation of the accrual statute.

And as indicated, if the accrual statute were to be interpreted so as to bar a cause of action before injury had actually occurred, that it raises a serious Constitutional question.

Tr. at 11.

* * *

Let me respond quickly to the intellectual question of how the Virginia Supreme Court interprets the accrual statute in question. I submit to Your Honor there are two dispositive cases, two recent Virginia Supreme Court cases which are cited in one of the footnotes, Robert Keller, III vs. Colin Devny [sic], III, decided by the Virginia Supreme Court on January 16, 1987.

They cite that in their footnote 3 for the proposition that in the concurring opinion, the Virginia Supreme Court in the concurring opinion stated it might very

well pose a serious constitutional question if you were to hold, which the Court did not do, that the statute of limitations would accrue and run before the injury occurred.

But that interpretation, at least in the concurring opinion, would raise serious constitutional questions. But the Court didn't need to reach that because the majority opinion recognized in Virginia as far as the interpretation of the accrual statute -- and that was a question of malpractice, attorney malpractice that occurred over a period of years[.]

Id. at 13, 14.

THE COURT: This is a difficult call. I'm denying the plea in bar without prejudice to any further fact finding on

it, and putting the parties on notice that I may issue a written opinion on this.

The written opinion may or may not overrule the plea in bar. It is a fascinating and to me a contradictory status as to what the statute is now in Virginia, and trial judges can read the various Supreme Court decisions and/or disagreements within the Supreme Court and recognize the law in Virginia may indeed be described as harsh, that the statute of limitations can run before you realize or can suffer your damage.

I think Virginia law states exactly that, that it can happen. But the saying of, the reading of, the comprehension of it keeps me in somewhat of a pause. So I'll look at it further, but for the moment, I deny it.

Id. at 23.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs,	:	
vs.	:	At Law No. 91-329
EXXON CORPORATION, et al., Defendants.	:	

Arlington, Virginia
Thursday, February 4, 1993

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

THE COURT: Well, Harbo[u]rgate construed at 230 is pretty clear. That is hard for the plaintiff. I mean that is where I got in that debate before in this case is can the plaintiff lose a cause of action before they suffer the damage, and this seems to say yes.

MR. McDONALD: Well, the Supreme Court of Virginia, there has never been a case that the Virginia Supreme Court has adopted this interpretation in a negligence case, and the Supreme Court has clearly indicated it would pose a serious constitutional question. What I'm suggesting is that the meaning of -- you known, what duties did they owe, when did the breach occur, did it require injury, and can there be continuing breaches of duty are very complicated factual questions, and there is going to be considerable factual dispute at trial. So the Virginia Supreme Court's interpretation of this language of the breach of the duty owed or when did the cause of action arise. In order for you to have a cause of action in negligence, does the injury have to occur. And the fact that this is underground that has

taken place over a period of time, and that there was active concealment is going to pose a very difficult set of facts.

THE COURT: Well, I think that is why I virtually denied it with reservations.

* * *

THE COURT: [§§] 8.01-230 and 8.01-243(b) in Harbo[u]rgate make pretty clear the five-year statute applies, and the start of compensable damage is not required for the five-year situation to apply. But there are multiple reasons in this case that I would not enforce a statute of limitations defeat of plaintiff's claim at this time, and they include estoppel arguments.

Tr. at 18-20.

SA-12

EXXON RESEARCH AND ENGINEERING COMPANY

March 3, 1987

Analysis of Recovered Products from Location 2-8704
Arlington, Virginia

Ref. No. 87AN 163

Mr. Dan Nieser
Exxon Company, U.S.A.
3600 East West Highway
Hyattsville, MD 20782

Dear Dan:

We have completed the Analysis of the recovered product samples from location 2-8704 Arlington, Virginia. The samples (well-1 and well-4) were collected by Handex Corporation and delivered to us for product identification analysis.

Gas chromatographic (GC) analysis found both well-1 and well-2 product samples to be weathered gasolines, in that a portion of the lower boiling components were no longer present. GC analysis for Exxon's proprietary additives HTA and XCL-12 detected HTA in product sample well-1. No HTA or XCL-12 was detected in product sample well-4; however, HTA and XCL-12 can decompose under certain soil conditions. Comparison of the GC chromatograms of the 5% bottoms analysis (Figures 1 and 2) shows differences in the two well samples.

Lead content by x-ray fluorescence found 0.74 grams per gallon lead in well-1 and 0.033 grams per gallon lead in well-4.

These data indicate the product in well-1 is weathered, leaded Exxon gasoline. The product in well-4 appears to be weathered, unleaded gasoline. The two product samples appear to be from different sources.

We plan no further work on these samples. If we can be of further assistance please let us know.

Sincerely,

s/s Norwood
N. Harris

03038702.NH

Att.

SA-14

EXXON COMPANY, U.S.A.

December 1, 1987
Various Exxon Sites
Northern Virginia

Ms. Jan Pickrel
Virginia Water Control Board
5515 Cherokee Avenue
Suite 404
Alexandria, Virginia 22312

Dear Jan:

Per your request at our meeting on November 13, 1987, I am providing the following:

EXXON R/S NO.	ADDRESS	ENCLOSED
Former 2-8704	3444 North Washington Arlington, Va.	Gauge Reports Well Map/ Boring Logs

* * *

As we discussed at our meeting, Exxon will continue to bail and gauge the wells at 2-8704.

As you may recall, 2-8704 is now a Texaco station and I asked you how long Exxon will be required to continue monitoring this site, since no one can be sure who is responsible for the product in the monitoring wells. Please let me know your thoughts on this issue.

* * *

Thank you for your continued help.

Highest Regards,

/s/ Gregory T. Hodgdon

GTH/mfj
064D/1287

Enclosure

cc: R.W. Dennis
L.W. Lindeen
D.J. Nieser (Washington, D.C. District Office)

(Emphasis added.)

Excerpts from independent environmental study conducted for Exxon by EA Engineering, Science, and Technology, Inc., dated March 31, 1987, state as follows:

At the time of the divestment [December 1986], EXXON removed the existing steel product tanks; according to Mr. Al Perdue, the present Texaco operator and former EXXON operator, the tanks were approximately 20 years old when removed. At that time, Mr. Perdue noticed several small "bullet-holes" in the tanks. A strong gasoline odor was also noted, along with a sheen on the water remaining in the excavated tank pit. Subsequent excavation work was conducted at the site and small fire occurred when a backhoe hit a rock.

* * *

. . . Examination of the data indicates the presence of significant concentrations of gasoline vapors in the vicinity of VP-8

(the area between the north pump island and the former pump island). Floating product was observed in monitoring well #3 (MW-3); headspace analysis indicate[s] significant concentrations of gasoline vapors are present in the remaining three wells.

* * *

. . . As noted in Section 2, the former EXXON tanks were noticeably damaged, and the likelihood of EXXON product loss is very great.

* * *

The primary hazard of concern is the migration of gasoline vapors to sanitary sewer lines located in the immediate vicinity. A second hazard of concern appears to be the possible contamination of the groundwater.